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MICHAEL RODAK, JR

IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-1700

SPERRY RAND CORPORATION,
A Delaware Corporation,
Petitioner,

—versus—

A-T-O, INC. (formerly "AUTOMATIC" SPRINKLER CORPORATION OF AMERICA), an Ohio Corporation, ELECTRONIC CONCEPTS, INC., a Virginia Corporation, JOHN E. ZENTMEYER, JR., and GUS K. TEBELL, JR.,
Respondents.

PETITIONER'S REPLY BRIEF

LEWIS T. BOOKER
HUNTON, WILLIAMS, GAY and GIBSON
700 East Main Street
Richmond, Va. 23212

FRANCIS J. MCNAMARA, JR.
JOHN S. MCGEENEY
RIDGWAY M. HALL, JR.
CUMMINGS & LOCKWOOD
One Atlantic Street
Stamford, Conn. 06904

Counsel for Petitioner

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PETITIONER'S REPLY BRIEF

CONFLICT AMONG THE CIRCUITS

Respondents attempt to dismiss with a wave of the hand six Court of Appeals decisions, all in diversity cases, all applying federal law, and all awarding attorneys' fees or other extraordinary costs on the authority of *Sprague*.

It is apparently now their position that federal law may govern the award of counsel fees in *some* diversity cases but state law governs the award of "counsel fees in a diversity tort action." (Resp. to Pet. p. 6). They also suggest that these six decisions can be distinguished on

the ground that "a party to a fiduciary relationship, [had] created or protected a trust fund for the benefit of a class, and fees [were] awarded as a lien on the fund." (Resp. to Pet. p. 6).

To the best of our knowledge no federal court has ever suggested that the choice between federal or state law turns on either distinction. In *Cleveland* v. *Second Nat. Bank & Trust Co.*, 149 F. 2d 466, 469 (6th Cir. 1945), cert. den. 326 U. S. 775 (1945) and *Brisacher* v. *Tracy-Collins*, 277 F. 2d 519, 524-525 (10th Cir. 1960), it was expressly stated that *Sprague* was not limited to cases involving a fund, but included the power to assess litigation expenses against a defeated party in an extraordinary case. In *First National Bank & Trust Co.* v. *Village of Skokie*, 190 F. 2d 791 (7th Cir. 1951) cert. den. 342 U. S. 909 (1952), the fees and expenses of the court appointed master and auditor were charged entirely against the unsuccessful defendant trustee as costs because of its failure to keep accurate and adequate records, 190 F. 2d at 796. Nothing in the case supports respondents' claim that these costs were "payable from sinking fund on sewer bonds." (Resp. to Pet. p. 7).

Respondents' attempt to gloss over the conflict among the circuits does not withstand even casual scrutiny. Indeed, the inadequacy of their effort to harmonize these cases serves to emphasize the real confusion that surrounds this problem.

THIS CASE IS AN EXCEPTIONAL ONE WARRANTING THE AWARD OF ATTORNEYS' FEES

Respondents' contention in Point IV of their Response to Petition is that the existence of a good faith defense to any of the claims made by the plaintiff precludes this from being an extraordinary case warranting an award of attorneys' fees under federal equity practice. In other words, one legitimate argument about any aspect of the

case entitles the defendants to engage in any kind of misconduct, no matter how gross, in all other aspects of the case.

This is nonsense. The federal courts should and do have certain inherent power to control the conduct of federal judicial proceedings. Here defendants have knowingly engaged in outrageously wrongful conduct such as the theft of Sperry's bid, and then have deliberately engaged in falsehood and fabrication to evade responsibility for their acts and to impede the judicial process. For example one E.C.I. witness testified on deposition to a fictional method by which he calculated the E.C.I. bid and later at trial was forced to admit that he in fact never made the calculations he had described. In such a case the court surely has power to award as costs to the injured party some portion of the increased burden of legal expense caused by such conduct. That is what the trial court did here because it found the defendants' conduct to be extraordinary.

We submit that this is not the time to water down the federal courts' control over the conduct of litigants. There is confusion among the circuits as to the nature and scope of the federal courts' power to award attorneys' fees in a diversity case. The time is ripe to lay this confusion to rest.

Respectively submitted,

FRANCIS J. MCNAMARA, JR.
LEWIS T. BOOKER
JOHN S. MCGEENEY
RIDGWAY M. HALL, JR.
Counsel for Petitioners

September 11, 1972